Hasan bin Datolah v Kerajaan Malaysia

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-01–27 OF 2002
ABDULL HAMID EMBONG FCJ, HASAN LAH AND SULAIMAN DAUD JJCA
23 NOVEMBER 2009

Professions — Medical practitioners — Negligence — Duty of disclosure upon doctors in doctor-patient relationships, exceptions to — Emergencies or special circumstances of patient

Professions — Medical practitioners — Negligence — Standard of care — Whether court to determine standard of care to be observed by medical practitioner — Determination of standard of care, how made

Tort — Negligence — Duty of care — Duty of disclosure upon doctors in doctor-patient relationships, exceptions to — Emergencies or special circumstances of patient

Tort — Negligence — Standard of care — Medical negligence — Whether court to determine standard of care to be observed by medical practitioner — Determination of standard of care, how made

The appellant was paraylsed after two surgical procedures (respectively a fenestration and a laminectomy) performed by DW1. He sued the respondent alleging, inter alia, negligence on the part of DW1 in performing the procedures. The High Court dismissed the appellant's action on, inter alia, the basis that he had failed to show the causative link between the resultant damage or injury and the act of DW1; and that DW1 had exercised the requisite degree of skill and care as required of him by law. The court also found that DW1 had properly explained to the appellant the risks of the surgical procedures. The appellant appealed to the Court of Appeal and submitted therein: (i) the trial judge had misdirected herself in adopting the *Bolam* test in determining whether DW1 had breached his duty of care to the appellant; (ii) the trial judge erred in failing to find DW1 negligent in performing the 'fenestration' first rather than the 'laminectomy'; and (iii) the appellant had not been properly informed of the risks associated with the procedures.

Held, dismissing the appeal with costs:

(1) The Federal Court decision of *Foo Fio Na v Dr Soo Fook Mun & Anor*

A [2007] 1 MLJ 593 had indeed rejected the *Bolam* test (as in *Bolam v Friern Hospital Management Committee* [1957] 2 All ER 118) in favour of the test adopted in the Australian case of *Rogers v Whitaker* (1992) 175 CLR 479. The determination of the standard of care to be observed by a medical practitioner in a medical negligence suit rests with the B court. The court may make such a determination upon evaluation of the evidence before it, including the opinion and practices of members of the medical profession (see paras 7 & 13); *Dr Soo Fook Mun v Foo Fio Na & Anor and another appeal* [2001] 2 MLJ 193 followed; *Rogers v Whitaker* (1992) 175 CLR 479 followed; *Rosenberg v Percival* (2001) C 178 ALR 577 followed; *Bolam v Friern Hospital Management Committee* [1957] 2 All ER 118 not followed.

(2) In the instant case, although the trial judge had expressly stated that she was applying the *Bolam* test, a perusal of the judgment showed that she had not based her finding solely on the professional opinion and D practice as envisaged by the *Bolam* principle. She had properly assessed and weighed all the evidence before her, particularly the opinion of the expert witnesses on the probable cause of the appellant's paralysis, before arriving at her own decision. She had not misdirected herself on the evaluation of the evidence, although she had made reference to the E *Bolam* test (see para 22).

(3) The appellant's counsel in pursuing the issue that DW1 was negligent in performing the 'fenestration' first rather than the 'laminectomy', had deviated from the appellant's pleaded case. In his statement of claim, the F appellant had asserted that his paralysis was solely due to the negligence of DW1 in carrying out the operations. The appellant's pleaded case was grounded on the effect of the operations which he claimed to have caused the paralysis, whereas the submission of the appellant's counsel was centered on the nature and technique of the operations performed. G This was a total departure from the pleading. Based on the pleading, the trial judge had correctly identified the issue before her, namely, whether the injury to the appellant's spinal cord was caused by DW1 in performing the operations on the appellant (see paras 16–18).

H (4) The trial judge had not erred when she found that the injury suffered by the appellant which resulted in his paralysis was not caused by the negligence of DW1 in the performance of both the surgeries, but due to delayed treatment (see para 21).

(5) In the instant case, the exception to the duty of disclosure imposed I upon a doctor in a doctor-patient relationship ought to apply. The appellant was suffering from 'cauda equina compression', which required an urgent and immediate operation to relieve the pressure on the nerves. The first surgical procedure was thus an emergency operation to prevent further damage to the compressed nerves in an

attempt to prevent paralysis. The information given by DW1 to the appellant in respect of the first operation was sufficient in the circumstances of the instant case. With regard to the second operation, the appellant was already paralysed before the second operation, and it was therefore immaterial whether or not DW1 had informed the appellant of that risk. In any event, DW1 had informed the appellant of his neurological status (see paras 28–19 & 32–33). *Foo Fio Na v Dr Soo Fook Mun & Anor* [2007] 1 MLJ 593 distinguished; *Rogers v Whitaker* (1992) 175 CLR 479 distinguished.

[Bahasa Malaysia summary

Perayu lumpuh selepas menjalani dua pembedahan (iaitu pemfenestratan dan laminektomi) yang dijalankan oleh DW1. Dia menyaman responden dangan dakwaan, antara lain, kecuaian di pihak DW1 dalam menjalankan pembedahan tersebut. Mahkamah Tinggi menolak tindakan perayu, antara lain, atas dasar bahawa perayu gagal menunjukkan rantaian penyebab antara akibat kerosakan atau kecederaan dan tindakan DW1; dan bahawa DW1 telah melaksanakan tahap kemahiran dan tanggungjawab yang dikehendaki undang-undang. Mahkamah juga mendapati bahawa DW1 telah menerangkan dengan sepatutnya kepada perayu tentang risiko pembedahan tersebut. Perayu merayu ke Mahkamah Rayuan dan menghujah: (i) hakim bicara telah salah arah apabila mengguna pakai ujian *Bolam* dalam menentukan sama ada DW1 telah melanggar kewajipan berjaga-jaganya terhadap perayu; (ii) hakim bicara telah khilaf apabila gagal mendapati bahawa DW1 cuai dalam menjalankan pembedahan pemfenestratan dahulu dan bukannya pembedahan laminektomi; dan (iii) perayu tidak dimaklumkan dengan sepatutnya tentang risiko-risiko pembedahan tersebut.

Diputuskan, menolak rayuan dengan kos:

(1) Keputusan Mahkamah Persekutuan dalam kes *Foo Fio Na v Dr Soo Fook Mun & Anor* [2007] 1 MLJ 593 telah menolak ujian *Bolam* (iaitu dalam kes *Bolam v Friern Hospital Management Committee* [1957] 2 All ER 118) dan menggunapakai ujian dalam kes Australia *Rogers v Whitaker* (1992) 175 CLR 479. Penentuan standard berjaga-jaga yang harus dipatuhi oleh pengamal perubatan dalam tindakan kecuaian perubatan terletak di tangan mahkamah. Mahkamah boleh membuat penentuan setelah menilai keterangan yang dikemukakan di hadapannya, termasuklah pandangan dan amalan-amalan pengamal perubatan (lihat perenggan 7 & 13); *Dr Soo Fook Mun v Foo Fio Na & Anor and another appeal* [2001] 2 MLJ 193 diikut; *Rogers v Whitaker* (1992) 175 CLR 479 diikut; *Rosenberg v Percival* (2001) 178 ALR 577 diikut; *Bolam v Friern Hospital Management Committee* [1957] 2 All ER 118 tidak diikut.

(2) Dalam kes ini, walaupun hakim bicara dengan jelas menyatakan bahawa beliau menggunapakai ujian *Bolam*, daripada penelitian penghakiman menunjukkan bahawa beliau tidak mendasarkan keputusannya hanya kepada pandangan professional dan amalan-amalan seperti yang digambarkan dalam prinsip *Bolam*. Beliau telah menilai dan menimbang dengan betul kesemua keterangan dihadapannya, terutamanya pandangan saksi-saksi pakar dan sebab kemungkinan kelumpuhan perayu, sebelum membuat keputusannya. Beliau tidak salah arah atas penelitian keterangan, walaupun beliau merujuk kepada ujian *Bolam* (lihat perenggan 22).

(3) Peguam perayu, dalam meneruskan isu bahawa DW1 telah cuai dalam menjalankan pemfenestratan terlebih dahulu dan bukannya laminektomi, telah tersasar daripada pliding kes perayu. Dalam penyata tuntutannya, perayu menegaskan bahawa kelumpuhannya adalah disebabkan semata-mata kecuaian DW1 dalam menjalankan pembedahan. Kes perayu adalah berdasarkan kepada kesan pembedahan tersebut yang didakwa telah mengakibatkan dia lumpuh, tetapi hujahan peguam perayu tertumpu kepada sifat dan teknik pembedahan yang dijalankan. Ini adalah berlainan sekali dengan pliding. Berdasarkan pliding, hakim bicara telah mengenalpasti isu di hadapannya, iaitu, sama ada kecederaan ke atas saraf tunjang perayu adalah disebabkan pembedahan yang dilakukan oleh DW1 ke atas perayu (lihat perenggan 16–18).

(4) Hakim bicara tidak khilaf apabila beliau mendapati bahawa kecederaan yang dialami oleh perayu yang mengakibatkan kelumpuhannya tidak disebabkan oleh kecuaian DW1 dalam menjalankan kedua-dua pembedahan, tetapi disebabkan kelewatan mendapatkan rawatan (lihat perenggan 21).

(5) Dalam kes ini, pengecualian atas kewajipan untuk pendedahan yang dikenakan terhadap seorang doktor dalam hubungan doktor dan pesakit harus terpakai. Perayu mengalami kauda ekuina mampat, yang memerlukan pembedahan segera dan serius bagi melegakan tekanan ke atas saraf. Prosedur pembedahan pertama merupakan pembedahan kecemasan bagi mengelakkan kecederaan yang lebih teruk ke atas saraf yang telah mampat dalam cubaan untuk mengelakkan kelumpuhan. Maklumat yang diberikan oleh DW1 kepada perayu tentang pembedahan pertama adalah mencukupi dalam keadaan kes ini. Berikutan pembedahan kedua, perayu sudahpun lumpuh sebelum pembedahan kedua tersebut dan tidak penting sama ada DW1 memberitahu tentang risikonya atau tidak. Walau apapun, DW1 telah memaklumi perayu tentang status sarafnya (lihat perenggan 28–29 & 32–33); *Foo Fio Na v Dr Soo Fook Mun & Anor* [2007] 1 MLJ 593 dibeza; *Rogers v Whitaker* (1992) 175 CLR 479 dibeza.]

Notes

For cases on duty of care, see 12 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 963–1011.

For cases on medical practitioners in general, see 10 *Mallal's Digest* (4th Ed, 2008 Reissue) paras 1608–1636.

For cases on negligence by medical practitioners, see 10 *Mallal's Digest* (4th Ed, 2008 Reissue) paras 1613–1623.

For cases on standard of care, see 12 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 1517–1519.

Cases referred to

Bolam v Friern Hospital Management Committee [1957] 2 All ER 118, QBD (not folld)

Dr Soo Fook Mun v Foo Fio Na & Anor and another appeal [2001] 2 MLJ 193; [2001] 2 CLJ 457, CA (folld)

Foo Fio Na v Dr Soo Fook Mun & Anor [2007] 1 MLJ 593; [2007] 1 CLJ 229, FC (distd)

Rogers v Whitaker (1992) 175 CLR 479, HC (folld)

Rosenberg v Percival (2001) 178 ALR 577, HC (folld)

Sidaway v Board of Governors of Bethlem Royal Hospital and The Maudsley Hospital & Ors [1985] AC 871, HL (folld)

Wilsher v Essex Area Health Authority [1988] 1 All ER 871, HL (folld)

Appeal from: Civil Suit No S4–21–49 of 1995 (High Court, Kuala Lumpur)

Gurbachan Singh (Bachan & Kartar) for the appellant.
Donald Joseph Franklin (Senior Federal Counsel, Attorney General's Chambers) for the respondent.

Sulaiman Daud JCA:

[1] The appellant, Hasan bin Datolah, appealed against the decision of the learned judge of the High Court in dismissing his claim against the respondent, the Government of Malaysia, for the negligence of their agents or servants in the performance of two surgical procedures on him. We heard the appeal on 13 May 2009, and after hearing submissions of counsel for both parties we dismissed the appeal with costs. We now give our reason.

BRIEF FACTS

[2] On the night of 30 April 1992, the appellant missed a step while climbing a staircase. He did not fall but only experienced a slight backache. On the following day he participated in a 'gotong royong', and went to work on the next following two days. It was only on 4 May 1992 that he first

sought treatment from a medical practitioner. On 5 May 1992 he was attended by another medical practitioner who referred him to Hospital Kuala Lumpur ('HKL').

[3] He was admitted to HKL at about midnight on the same day. On the following day 6 May 1992, he was seen by the orthopedic surgeon of the ward, Dr Yeow Chai (DW1). He complained of backache, numbness of the lower limbs and difficulty in passing urine. Neurological assessment of his lower limbs showed severe limitation of straight hip raising. The ankle test was negative and there was weakness of both the big toes' extensor and flexor muscles. He experienced decreased sensation from L3 level downwards. Based on the clinical features, the x-ray result and the CT myelogram report, DW1 diagnosed the appellant as suffering from 'cauda equina compression syndrome', ie compression of the nerve roots below the level of the spinal cord. In the present case the compression was due to prolapsed disc at L3-L4 that resulted in the narrowing of the root canal.

[4] DW1 found it necessary to perform an 'emergency operation' on the appellant to relieve the compression. On 7 May 1992 he performed a surgical procedure 'fenestration with disectomy of L3 and L4' ('fenestration') on him. The L3-L4 disc and part of the lamina were removed. However, immediately following the surgery his neurological condition deteriorated. His second CT myelogram done on 22 June 1992 showed 'block at L3/L4 disc level downwards'. There was also evidence of lumbar canal stenosis. Consequently on 26 May 1992 DW1 performed the second surgical procedure 'posterior decompression (L3-L4 laminectomy with partial facetectomy L3–4, L4–5)' ('laminectomy') where part of the L3 and L4 laminas and the L3 and L4 spinous processes were removed. After the second operation the appellant remained paralysed but however showed some improvement in his sensation. He was discharged on 24 June 1992. On 8 April 1993 he was seen by Dr Tassim Rajan (PW3), a consultant orthopedic surgeon at Tawakal Hospital, who performed a spinal exploratory surgery on him on 13 April 1993.

[5] On 27 March 1995, the appellant commenced the present action against the respondent for the negligence of their servant DW1 in the performance of the two operations aforesaid, and in failing to warn him of the risk thereof. The allegation of negligence pleaded and pursued at the trial and in this appeal were as follows:

(a) Failing to take reasonable care and skill during the operation so as to negligently caused damage to the plaintiff's spinal nerve resulting in complete paralysis of his waist and lower limbs.

(b) Failing to inform him of the inherent risk involved in the operation, which he would not have agreed and/or consented to undergo had he been properly advised.

[6] The learned trial judge found that DW1 had acted properly and adequately according to competent medical practice, and that he had properly explained to the appellant the risk of the surgery. In dismissing the appellant's claim, the learned trial judge at the end of her judgment said as follows:

> Thus, from the totality of evidence before me and applying the *Bolam* test, it is my considered opinion that Dr Yeow (DW1) had exercised the requisite degree of skill and care as is required of him by law.

[7] Mr Gurbachan Singh, for the appellant, firstly submitted that the learned trial judge has misdirected herself in adopting the *Bolam* test (in *Bolam v Friern Hospital Management Committee* [1957] 2 All ER 118) in determining whether or not DW1 has breached his duty of care to the appellant on both the issues aforesaid. He pointed out the Federal Court in *Foo Fio Na v Dr Soo Fook Mun & Anor* [2007] 1 MLJ 593; [2007] 1 CLJ 229 had rejected the *Bolam* test in favour of the test adopted in the Australian case of *Rogers v Whitaker* (1992) 175 CLR 479 (the '*Rogers v Whitaker* test').

[8] The *Bolam* test was enunciated by McNair J in *Bolam*'s case, where His Lordship said, at p 121:

> ... where you get a situation which involves the use of some special skill or competence, then the test whether there has been negligence or not is not the test of a man on the top of a Clapham omnibus, because he has not got this skill. The test is the standard of the ordinary skilled man exercising and professing to have that skill.

His Lordship further pointed out, at p 122:

> ... A doctor is not guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that medical art … Putting it the other way round, a doctor is not negligent, if he is acting in accordance with such a practice, merely because there is a body of opinion that takes the contrary view.

[9] The *Bolam* test was not followed by the High Court of Australia in *Rogers v Whitaker*. In that case a patient brought an action for negligence against an ophthalmic surgeon who performed an elective surgery to her right eye. Although there was a remote risk that the operation could affect her good eye but she was not so informed. Coincidentally, that risk eventuated which caused her to be blind in both eyes. She brought an action against the appellant alleging, among others, that the appellant was negligent in failing to warn her of the risk of the operation. In determining the standard of care of the surgeon, the court adopted with approval the test laid down by Lord Scarman, the dissenting judge, in *Sidaway v Board of Governors of Bethlem*

Royal Hospital and The Maudsley Hospital & Ors [1985] AC 871 to the effect that whether a doctor has breached his duty of care towards his patient is to be determined not exclusively by reference to the current state of responsible and competent professional opinion and practice at the time of the matter in question.

[10] In *Rogers v Whitaker*, Their Honours in their joint judgment said, at p 487:

> In Australia, it has been accepted that the standard of care to be observed by a person with some special skill or competence is that of the ordinary skilled person exercising and professing to have that skill. But that standard is not determined solely or even primarily by reference to the practice followed or supported by a responsible body of opinion in the relevant profession or trade. Even in the sphere of diagnosis and treatment, the heartland of the skilled medical practitioner, the *Bolam* principle has not always been applied. Further, and more importantly, particularly in the field of non-disclosure of risk and the provision of advice and information, the *Bolam* principle has been discarded and, instead, the courts have adopted the principle that, while evidence of acceptable medical practice is a useful guide for the courts, it is for the court to adjudicate on what is the appropriate standard of care after giving weight to 'paramount consideration that a person is entitled to make his own decisions about his life'.

The Rogers v Whitaker test was explained with clarity by Gleeson CJ in another Australian High Court case of *Rosenberg v Percival* (2001) 178 ALR 577, in the following words, at p 579:

> … *Rogers v Whitaker*, makes clear, the relevance of professional practice and opinion was not denied; what was denied was its conclusiveness. In many cases, professional practice and opinion will be the primary, and in some cases it may be the only, basis upon which a court may reasonably act. But, in an action brought by a patient, the responsibility of deciding the doctor's duty of care rests with the court, not with his or her own professional colleagues.

Foo Fio Na, concerned a patient who underwent a surgical operation for dislocation of the fifth and sixth cervical vertebrae. He became paralysed the day after the operation. It was established that the paralysis was due to the pressure on the spinal cord caused by the wire loop placed to correct the dislocation. He sued the orthopedic surgeon who performed the operation for negligence. Learned judge found for the appellant but the decision was reversed by the Court of Appeal. On appeal to the Federal Court, the question of law posed before the court was 'whether the 'Bolam test' should apply in relation to all aspects of medical negligence'. The court answered the question in the negative. In delivering the judgment of the court, Siti Norma Yaakob FCJ (as she then was), after referring to a number of earlier cases on this subject (including *Rogers v Whitaker*) said, at p 258:

> … there is a need for members of the medical profession to stand up to the wrong doings, if any, as is the case of professionals in other professions. In so doing people involved in medical negligence cases would be able to obtain better professional advice and that the court would be appraised with evidence that would assist them in the deliberations. On this basis we are of the view that the *Rogers v Whitaker* test would be more appropriate and a viable test of this millennium than the *Bolam* test.

[11] Based on the above passage, we agree with learned counsel that *Foo Fio Na*, had without doubt rejected the *Bolam* test in so far as it relates to the determination of the standard of care to be observed by a medical practitioner in a medical negligence suit. The right or responsibility to make such a determination now rests with the court upon evaluation of the evidence before it, including the opinion and practices of members of that profession. Be that as it may, in the present appeal we cannot at this stage determine whether or not the learned trial judge has misdirected herself in the application of the law as contended without first determining the context in which it was applied ('the misdirection issue'). We will consider this issue in the course of dealing with the two allegation of negligence raised in this appeal. We will firstly deal with the performance of both the operations by DW1.

WHETHER DW1 NEGLIGENT IN THE PERFORMANCE OF THE OPERATIONS

[12] With regard to this issue, the learned trial judge in her judgment firstly traced the event from the onset of the appellant's injury to the time of his admission to HKL. After that she considered the various tests and investigations carried out on the appellant and the subsequent surgical operations performed by DW1 on him. She then considered and evaluated the evidence of the expert witnesses, including the choice between the two surgical procedures and the cause of the appellant's subsequent paralysis.

[13] Having evaluated the evidence before her, the learned trial judge concluded as follows:

> At this juncture, I am convinced that the activities engaged by the plaintiff prior to his admission to the hospital and the delay in seeking medical treatment had aggravated his injury. In fact, even PW3 in his testimony was unsure whether or not the surgery caused the paralysis. As such, I am of the view that the plaintiff has failed to show to this court the causative link between the resultant damage or injury to the act of the doctor.

[14] Mr Gurbachan Singh contended that the learned trial judge erred in failing to find DW1 negligent in performing the 'fenestration' first rather than the 'laminectomy'. According to him the learned trial judge has failed to appreciate the undisputed experts' evidence that laminectomy would give better exposure of the compressed nerves compared to fenestration. He also pointed out all the experts were in agreement that the appellant would have better chance of recovery if DW1 had performed the laminectomy first. In addition he contended that the evidence clearly showed there were obstruction at both L3/L4 and L4/L5 level but DW1 only confined the first surgery to the L3/L4 level. Accordingly, learned counsel submitted had the learned trial judge gave due weight to the undisputed opinion of the experts aforesaid, she would not have made the finding she did.

[15] In our view, learned counsel in taking up this issue has deviated from the appellant's pleaded case. The appellant's cause of action on the issue of causation was set out in para 4 of the statement of claim where he alleged that he was operated by one Dr Yeow (DW1), the servant of the respondent, who negligently caused damage to his spinal nerve resulting in his paralysis. In para 6 of the statement of claim, he asserted that his paralysis was solely due to the negligence of DW1 in carrying out the said operation. The particulars of negligence and breach of professional duty in carrying out the same were set out in items (a) and (b) of para 7 which read as follows:

> (a) Failing to exercise a fair and reasonable and competent degree of care and skill in the performance of the operation on the plaintiff so as to cause damage to the plaintiff's spinal nerve resulting in complete paralysis of the waist and lower limbs and to cause pain and suffering, agony, distress and discomfort so as to be unable to walk or perform his daily duty and to be unable to earn his livelihood.
>
> (b) Failing to exercise reasonable care and skill in the use of the scalpel and other operative equipment so as to cause damage to the plaintiff's spinal nerve resulting in complete paralysis of the waist and lower limbs which no competent and careful practitioner would have committed.

[16] From the particulars aforesaid, it is apparent to us that the appellant's pleaded case was grounded on the effect of the operations which he claimed to have caused the paralysis. But the submission of learned counsel was centered on the nature and technique of the operations so performed which was a total departure from the pleading. Based on the pleading, we are satisfied that the learned trial judge had correctly identified the issue before her, namely, whether the injury to the appellant's spinal cord was caused by DW1 in performing the operation on the appellant.

[17] The law on the burden of proof of causation is well settled. This court in *Dr Soo Fook Mun v Foo Fio Na & Anor and another appeal* [2001] 2 MLJ 193; [2001] 2 CLJ 457 adopted with approval the decision in *Wilsher v Essex Area Health Authority* [1988] 1 All ER 871, where Lord Bridge, after referring to some earlier conflicting decisions said, at p 881, that 'the onus of proving causation lies on the pursuer or plaintiff'.

[18] On the issue of causation, both parties called their own expert witnesses. The appellant's witness was Dr Tassim Rajan ('PW3'), a consultant orthopedic surgeon from Tawakal Hospital, while the respondent called Dr Muhd Borhan Tan ('DW2') and Dr Shong Hing Kok ('DW3'), both being orthopedic surgeons in the government service. All the expert witnesses confirmed that DW1 had made the correct diagnosis of cauda equina compression syndrome. They agreed that there was a complete block at the L3/L4 level. DW2 agreed with PW3 that the CT myelogram also showed similar block at the L4/L5 level. All the witnesses expressed the same view that such a condition is a surgical emergency because any delay in seeking treatment can lead to paralysis. With regard to the appellant's paralysis, both DW2 and DW3 agreed that it was not caused by the two operations performed by DW1. In their opinion it was the complication of his injury due to the delayed treatment. Whereas the appellant's own expert (PW3) said 'it is difficult to say whether the surgery caused or did not cause the paralysis'. The expert witnesses however differed on the nature of the surgery to be first performed on the appellant. PW3 was of the view that laminectomy would be preferred to fenestration as it would result in better exposure. However, both DW2 and DW3 were of the view that the first surgical procedure was appropriate as DW1 had also removed the prolapsed disc.

[19] Based on the evidence aforesaid, we are satisfied that the learned trial judge had not erred when she found that the injury suffered by the appellant which resulted in his paralysis was not caused by the negligence DW1 in the performance of both the surgeries but was the result of the delayed treatment.

[20] With regard to the issue of misdirection aforesaid, it is not disputed that the learned trial judge in her judgment had expressly stated she was 'applying the *Bolam* test' in determining the standard of care of DW1. However, upon perusal of the judgment as a whole we are more than satisfied that she did not based her finding solely on professional opinion and practice as envisaged by the *Bolam* principle. We observed that the learned trial judge had properly assessed and weighed all the evidence before her, particularly the opinion of the expert witnesses on the probable cause of the appellant's paralysis, before arriving at her decision. It is apparent to us that the learned trial judge's finding was based on two broad grounds, firstly, she was of the view that there was no evidence led to show that the injury to the appellant's

nerve was caused by the negligent act of DW1 in performing the two surgeries; and secondly, she accepted the evidence DW2 and DW3 that the spinal injury sustained by the appellant was a serious one and that the delay in seeking medical treatment had aggravated his injury which eventually caused the paralysis. In addition she also considered the evidence of PW3, the appellant's own expert witness, who was unsure whether the paralysis suffered by the appellant was caused by DW1 in the course of the operation. In the final analysis, we are satisfied that the learned trial judge had not misdirected herself on the evaluation of the evidence before her although she made reference to the *Bolam* test.

[21] For the reasons aforesaid, the appeal under this heading must necessarily fail. We next turn to consider the issue of consent.

ISSUE OF CONSENT

[22] With regard to the issue of consent, the learned trial judge in her judgment said as follows:

> On the issue of whether DW1 had properly administered caution and properly explained to the plaintiff the risk of the surgery, I feel that DW1 had adequately obtained written consent from the plaintiff. The plaintiff too had never, at any time during the proceedings, brought forth any solid evidence that this was not done. Furthermore, the plaintiff had ample opportunity to pose any questions to DW1 to clear any doubts that he might have concerning the surgery he was to undergo.

[23] In addition, the learned trial judge also referred to a passage in *Sidaway v Board of Governors of Bethlem Royal Hospital and The Maudsley Hospital & Ors*, to the effect that a patient cannot complain of lack of information unless the patient asked in vain for more information or unless there exist special danger which has to be disclosed to the patient to enable him to make his decision whether to submit to the operation or otherwise.

[24] Learned counsel for the appellant contended that the learned trial judge did not address her mind to the risk factor adequately or at all. According to learned counsel there was nothing in DW1's testimony to show that the appellant was informed of any risk of paralysis if he had undergone the operation. DW1 only explained the risk of the second operation which according to him was not sufficient or adequate. He further submitted that the learned trial judge also fell into error in confusing the risk factor with consent for operation. Further, learned counsel contended that there is no duty upon the appellant to make further enquiries as to the possible risk of the operation.

[25] In the present case it is not disputed that the appellant had formally consented to both the operations as evidenced by the consent forms dated 6 May 1992 and 25 May 1992 respectively. However it is settled law that the doctor-patient relationship makes it duty bound for the practitioner 'to inform his patient who is capable of understanding and appreciating such information of the risks involved in any proposed treatment so as to enable the patient to make an election whether to proceed with the proposed treatment with knowledge of the risks involved or decline to be subjected to such treatment' (per Siti Norma Yaakob FCJ (as she then was) in *Foo Fio Na*).

[26] In *Rogers v Whitaker*, Their Honours envisaged certain exception to the duty of disclosure where they said at p 636:

> … unless there is some medical emergency or something special about the circumstances of the patient, there is simply no occasion to consider the practice or practices of medical practitioners what information should be supplied. However, there is some scope for a consideration of those practices where the question is whether, by reason of the emergency or the special circumstances of the patient, there is no immediate duty or its content is different from what which would ordinarily be the case.

[27] In our view the same approach should be adopted in the present case. With regard to the first operation, it is to be recalled that all the expert witnesses were in agreement that patient with cauda equina compression requires urgent and immediate operation to relieve the pressure on the nerves, and which if left untreated would lead to paralysis. We accepted the evidence of the respondent's experts that the injury suffered by the appellant was serious and he had to undergo an emergency operation to prevent further damage to the compressed nerves.

[28] With regard to the information given in respect of the first operation, DW1 testified as follows:

> I explained to the patient about the operation.
>
> I explained to the patient on 7.5.92 at 8.00 a.m.
>
> I explained to the patient as written there (p. 94 – Bundle B)
>
> I cannot recollect whether I elaborate further. If I remember correctly the patient did not object to the operation. So we went ahead with the operation.
>
> The operation was very necessary at that time. The patient was told about that. I told him if an operation is not done it might become worse. He might not function normally as the nerve might get weak.
>
> So I made arrangement for an emergency operation.

[29] His notes as to the explanation given to the appellant read as follows:

> Explained to patient aim of surgery ie to relief compression of the cauda equina and in so doing may improve his neurological recovery and will prevent further deterioration of sign and symptom.

[30] It is to be observed that the appellant's expert witness (PW3) did not dispute DW1's finding that an emergency operation had to be performed on the appellant, and that the compression had already set in which if not attended to immediately would result in paralysis. The facts in both *Foo Fio Na* and *Rogers v Whitaker*, are easily distinguishable from that of the present case. In those two cases the evidence showed that the operations performed were elective and the injuries that eventuated were the risk resulting from the said operations. However in the present case the compression or damage to the nerves had already occurred before the first operation. The purpose of the operation was to prevent the occurrence of paralysis which would have eventuated from the compression or injury itself. In our view whether or not there was sufficient disclosure of the risk of the operation must be decided in relation to the peculiar circumstances of the present case. We agree with the aforesaid observation made in *Rogers v Whitaker*, that there was a need to give different consideration in the case of an emergency. Having considered that the appellant had already shown sign of progressing paralysis with bladder dysfunction before the first surgery, and that the surgery carried out was an emergency operation which if not carried out would result in paralysis, we are of the view that the information given by DW1 to the appellant in respect of the first operation was sufficient in the circumstances of the present case.

[31] With regard to the second operation, it is not disputed that the appellant was already paralysed before the second operation, and therefore it is immaterial whether or not DW1 had informed the appellant of that risk. In any event it is clear from DW1's notes that he had informed the appellant that there was no neurological recovery after the first operation and that the second operation may or may not improve his neurological status.

[32] However, even if DW1 was in breach of his duty of care to inform the appellant of the risk of the operation, the next issue for determination is whether the appellant's paralysis was attributable to DW1's breach of duty of disclosure of the risk. In order to succeed on this issue, the appellant must show, firstly that he suffered the paralysis as a result of the operation, and secondly he would not have consented to the operation if he was informed of such risk. This is again related to the issue of causation. As we have found against the appellant on the issue of causation, the appeal under this heading

must also fail. Likewise, we also find it unnecessary to decide whether or not the learned trial judge had applied the right test in her finding on this issue for the same reason.

[33] For these reasons, we unanimously dismissed the appeal with costs. The order of the High Court was affirmed, and the deposit to be paid out to the respondent to account of taxed costs.

Appeal dismissed with costs.

Reported by Andrew Christopher Simon